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No. 15-1112

IN THE
# Supreme Court of the United States

WELLS FARGO & CO.
and WELLS FARGO BANK, N.A.,
*Petitioners*,

v.

CITY OF MIAMI,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF IN SUPPORT OF CERTIORARI

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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

## TABLE OF CONTENTS


Page

RULE 29.6 DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

ARGUMENT ..... 2

THIS COURT SHOULD GRANT REVIEW TO DECIDE BOTH QUESTIONS PRESENTED ..... 2

A. This Case Is An Ideal Vehicle For Deciding Both Questions ..... 2

B. The Questions Are Worthy Of This Court's Review ..... 6

C. The Decision Below Is Plainly Wrong ..... 9

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

Page

CASES:

*Amgen Inc.* v. *Harris*,
136 S. Ct. 758 (2016) (per curiam) ..... 4

*Arizona* v. *Evans*,
514 U.S. 1 (1995) ..... 7

*County of Cook* v. *Wells Fargo & Co.*,
115 F. Supp. 3d 909 (N.D. Ill. 2015) ..... 8

*Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*,
134 S. Ct. 1377 (2014) ..... 4, 5, 7

*OBB Personenverkehr AG* v. *Sachs*,
136 S. Ct. 390 (2015) ..... 4

*Spokeo, Inc.* v. *Robins*,
No. 13-1339, 2016 WL 2842447
(U.S. May 16, 2016) ..... 4

*Thompson* v. *N. Am. Stainless, LP*,
562 U.S. 170 (2011) ..... 7, 8, 9, 10

*Trafficante* v. *Metro. Life Ins. Co.*,
409 U.S. 205 (1972) ..... 7

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## REPLY BRIEF IN SUPPORT OF CERTIORARI

## INTRODUCTION

The first question in the petition presents a clean and simple issue for this Court to decide: whether the term "aggrieved" in the Fair Housing Act should be construed more narrowly than the outer boundaries of Article III. The City attempts to dissuade this Court from granting review, pointing to ongoing proceedings below and the need for further percolation. But the question presented is entirely unrelated to any further proceedings below; this Court routinely decides legal questions in an interlocutory posture; and any further percolation would be a waste of time, given the fundamental conflict in this

Court's own decisions on the meaning of the term "aggrieved."

The City also tries to discourage review of the second question presented—whether the City is an "aggrieved person" under the FHA. But all of the allegations that might bear on that question were already before the lower courts when they rendered their decisions below, making this an ideal vehicle for review. And in any event, nothing the City says about the second question should deter this Court from granting the first, which stands on its own as a fundamentally important question, deserving of this Court's review.

## ARGUMENT

### THIS COURT SHOULD GRANT REVIEW TO DECIDE BOTH QUESTIONS PRESENTED

#### A. This Case Is An Ideal Vehicle For Deciding Both Questions

1. The first question presented asks whether the term "aggrieved" in the FHA imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III. The City contends that this case is a poor vehicle for deciding that question because there are ongoing proceedings in the District Court. Br. in Opp. 6-8. That contention fails.

*First*, there have not been, and will not be, any further proceedings on the meaning of the term "aggrieved." That issue was definitively resolved in the Eleventh Circuit's decision below, which held that "the term 'aggrieved person' in the FHA sweeps as broadly as allowed under Article III." Pet.

App. 16a. That holding is now the law of the circuit and the law of this case.

*Second*, the proceedings in the District Court involve entirely separate issues regarding, for instance, the FHA's statute of limitations and the viability of the City's disparate-impact theory. Br. in Opp. 7. Because those issues have no bearing on the meaning of the term "aggrieved," there would be no reason to await further proceedings before deciding the question here.

*Third*, the meaning of "aggrieved" is a threshold issue of "statutory standing," which goes to who may bring an FHA suit in the first place. Pet. App. 14a; *see* Pet. 15; Chamber of Commerce *Amicus* Br. 12. Threshold issues are supposed to be decided before other issues pertaining to the merits. And indeed, this Court's intervention could make further proceedings on the merits unnecessary, saving all involved a great deal of time and resources.

*Fourth*, there is no real danger that further proceedings below would moot this Court's review. Even if the District Court were to dismiss the City's latest complaint on grounds unrelated to the questions presented here, the City has given every indication that it would appeal that dismissal to the Eleventh Circuit. *See* Br. in Opp. 7 ("[A] ruling adverse to the City will provide a basis for a return to the Eleventh Circuit * * * ."). Thus, further proceedings below are unlikely to wrap up any time soon. Moreover, should certiorari be granted, Wells Fargo would ask the lower courts to stay proceedings pending this Court's review. The City fails to identify any reason a stay would not be granted.

*Fifth*, the City's analogies are completely inapt. The City observes that the "*denial* of a motion to dismiss * * * is not immediately reviewable" in the Court of Appeals. *Id.* at 6 (emphasis added) (internal quotation marks omitted). But the District Court in this case *granted* a motion to dismiss, Pet. App. 81a-82a, and that final judgment was reviewable in the Eleventh Circuit and is likewise reviewable here. The City also compares this "situation" to "an appeal of the denial of a preliminary injunction, which is mooted by a district court's decision on the permanent injunction." Br. in Opp. 7. But whereas preliminary and permanent injunctions involve overlapping issues, the meaning of the term "aggrieved" is, as explained above, entirely separate from any issue still being litigated in the District Court.

*Sixth and finally*, this Court routinely grants certiorari in cases like this one, to review the reversal of the dismissal of a complaint. *See, e.g.*, *Spokeo, Inc.* v. *Robins*, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016); *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam); *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015). For example, in *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)—as in this case—the district court granted the petitioner's motion to dismiss on statutory standing grounds. *Id.* at 1385. The court of appeals reversed, just as it did here. *Id.* And when the petitioner sought certiorari, the respondent argued, as the City argues here, that "the case is a poor vehicle because the decision is interlocutory." Br. in Opp. 7, *Lexmark*, 134 S. Ct. 1377 (No. 12-873), 2013 WL 1868360. The Court nevertheless granted certiorari and held that a cause of action under the statute was *not* "available to anyone who can satisfy

the minimum requirements of Article III." *Lexmark*, 134 S. Ct. at 1388. That is precisely what this Court should do here. And for all of these reasons, the interlocutory posture of this case should not stand in the way.

2. As for the second question presented—*i.e.*, whether the City is an "aggrieved person" under the FHA—the City argues that this Court's decision would "constitute little more than an advisory opinion" because the City amended its complaint following the Eleventh Circuit's decision. Br. in Opp. 18. But the fact that the City has amended its complaint is no reason to deny review.

To begin, the amendments at issue were already before the lower courts when they rendered their decisions below. When the City moved for reconsideration of the District Court's dismissal of the City's original complaint, the City attached a proposed amended complaint including "further detail" about "the efforts of the City's Department of Community and Economic Development to operate the City's fair housing program, reduce illegal housing discrimination," and so on. *Id.*; *see* Br. in Opp. App. 3a. Those proposed amendments were virtually identical to the allegations that appear in the City's latest complaint. *Compare* Br. in Opp. App. 1a-3a (the City's proposed amended complaint attached to its motion for reconsideration), *with id.* at 4a-6a (the City's latest complaint). The District Court denied reconsideration, holding that the City's proposed amendments "f[ell] far short of alleging facts sufficient to demonstrate that Defendants' lending practices adversely affected the racial diversity or integration of the City." Pet. App. 79a n.1; *see id.* at 72a-73a. Thus, contrary to the City's assertion, Br. in Opp. 19-20, its additional

allegations *have been* reviewed—and still found insufficient by the District Court. Because those proposed amendments were part of the record below, they would also be part of the record before this Court, making this an ideal vehicle for review.

Further, a decision rendered based on the record in front of the Eleventh Circuit can hardly be described as "advisory." As noted, the question whether the City falls within the FHA's zone of interests has already been conclusively decided by the Eleventh Circuit. Pet. App. 14a-16a. Absent this Court's intervention, the decision below will be the Eleventh Circuit's last—and only—word on the issue, no matter how many times the City amends its complaint. It is therefore appropriate for this Court to review that decision in light of the record that was before the Eleventh Circuit.

In any event, this Court could always decide that the FHA's zone of interests is narrower than Article III—and that the zone does not encompass merely economic injuries—and then remand for the lower courts to apply those legal principles to the City's amended allegations in the first instance. Thus, whether this Court considers the City's amendments or not, there is no obstacle to this Court's review.

### B. The Questions Are Worthy Of This Court's Review

The City contends that the questions presented are unworthy of this Court's review for two reasons: first, because the meaning of the term "aggrieved" would "benefit from further ventilation" in the lower courts, Br. in Opp. 11; and second, because the petition complains only of "the misapplication of a properly

stated rule of law." *Id.* at 17 (internal quotation marks omitted). Neither contention is true.

1. As explained in the petition, additional percolation would serve little purpose. Pet. 11. The conflict over the meaning of "aggrieved" lies in this Court's own decisions. *Thompson* v. *North American Stainless, LP*, 562 U.S. 170 (2011), holds that the term "aggrieved" should be construed more narrowly than Article III, and *Lexmark* confirms the same. Pet. 9-10. By contrast, the Court stated in a trio of older cases beginning with *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), that statutory standing under the FHA extends to the outer bounds of Article III. Pet. 8-9.

Given these two conflicting lines of decisions, "additional percolation would not serve any significant law-development function." Chamber of Commerce *Amicus* Br. 4. To be sure, lower courts might wrestle with "what is the binding Supreme Court precedent." *Id.* But that is not the question that this Court must ultimately decide. The issue for this Court is not which of its opinions a lower court should treat as binding. Rather, the issue is what is the best interpretation of the term "aggrieved." And because this Court's opinions have already staked out both sides of that issue, further percolation would result only in lower courts choosing which side to follow—an exercise that would do nothing to help this Court reach a "better informed" decision on the underlying merits of what "aggrieved" means. *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

The lower-court decisions that the City cites simply prove the point. The City points, for example, to a district court's nonfinal decision from the Northern

District of Illinois holding that "aggrieved" under the FHA is narrower than Article III. *See* Br. in Opp. 9-10 (discussing *County of Cook* v. *Wells Fargo & Co.*, 115 F. Supp. 3d 909 (N.D. Ill. 2015)). But that decision did not rest on any fresh analysis of the statutory text. Rather, it rested on the court's view that it was bound by *Thompson*, rather than by this Court's older FHA cases. *See County of Cook*, 115 F. Supp. 3d at 916-918. The district court's focus on which of those opinions were binding only confirms that additional percolation in the lower courts is not going to be helpful to this Court. Like the decision below, the district court did not "meaningfully engage with any of the relevant issues," and instead held simply that it was bound by one set of decisions over another. Chamber of Commerce *Amicus* Br. 15. Only this Court can move beyond the conflict in its own opinions and decide which side is right as a matter of statutory interpretation.

And the costs of delaying review are significant. As *amici* explain, the decision below "threatens to turn a wave of litigation into a torrent," as plaintiffs seek to take advantage of the Eleventh Circuit's "open-ended approach to standing under the FHA." Am. Bankers Ass'n *Amicus* Br. 9. The costs of such "extensive and unpredictable liability" will be borne by financial institutions and, ultimately, residential lending markets. Chamber of Commerce *Amicus* Br. 5; *see also id.* at 16. Thus, rather than permit percolation simply for percolation's sake, this Court should intervene now and decide who may sue under the FHA.

2. The City also attempts to portray the petition as seeking only fact-bound error correction. It quotes half of a sentence from the decision below, stating

that, "to the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case." Br. in Opp. 16 (quoting Pet. App. 47a). And based on that partial quotation, the City represents the Eleventh Circuit as holding that "the City's interests were well aligned with the statutory prohibitions found in the FHA." *Id.*

The Eleventh Circuit held nothing of the sort. The Eleventh Circuit never addressed whether the City's interests were "well aligned with the statutory prohibitions found in the FHA" because—in the part of the sentence above that the City leaves out—the Eleventh Circuit held that "the term 'aggrieved person' in the FHA sweeps as broadly as allowed under Article III." Pet. App. 47a. It is that legal standard—not the mere application of it—that the first question presented challenges, asking whether the FHA actually imposes a standard "more stringent" than Article III. Pet. i. And that simple and straightforward legal question, on which this Court's own decisions are in fundamental conflict, warrants this Court's immediate review.

### C. The Decision Below Is Plainly Wrong

On the merits, the City has precious little to say. With respect to the first question presented, the City's only attempt to square the decision below with *Thompson* is to say that *Thompson* was a Title VII case, "not an FHA case." Br. in Opp. 13. That is certainly true, but *Thompson* involved the same term "aggrieved," and saw "no reason why" that term should have a different meaning in the FHA. 562 U.S. at 177. As a matter of statutory interpretation, therefore, the FHA—like Title VII—should be construed to impose a zone-of-interests requirement

more stringent than Article III. *See* Pet. 13. Not even the Eleventh Circuit disputed this logic, acknowledging that *Thompson*'s "interpretation of Title VII may signal that the Supreme Court is prepared to narrow its interpretation of the FHA in the future." Pet. App. 45a.

As for the second question presented, the City does not seem to dispute that if the FHA should be construed more narrowly than Article III, then a plaintiff who alleges injury to only *economic* interests would fall outside the zone protected by the FHA. Instead, the City now maintains that Wells Fargo's alleged conduct has injured the City's *non*-economic "interest in promoting fair housing and securing the benefits of an integrated community." Br. in Opp. App. 3a, 6a; *see also* Br. in Opp. 19. But as the District Court concluded, the City has failed to explain how Wells Fargo's alleged conduct in fact affected "the racial diversity or integration of the City." Pet. App. 79a n.1. And the City has further failed to explain how that supposed effect on "racial diversity or integration" bears any relationship to its request for compensatory damages. *Id.* Because the City has not plausibly alleged that it is an "aggrieved person" under the FHA, it has no right to sue to enforce the statute, and the Eleventh Circuit's contrary decision should be reversed.

## CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

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